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No. .....

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1987

DEAN WITTER REYNOLDS INC.
and HENRY H. DUKE
Petitioners,

VS.

BILLIE L. WEDERSKI,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, FOURTH APPELLATE DISTRICT, DIVISION THREE

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QUESTIONS PRESENTED

The parties in this case entered into written agreements to arbitrate disputes arising between them. The questions presented are:

(1) Whether the United States Arbitration Act mandates arbitration of otherwise arbitrable state law claims where a party alleges that fraud "permeated" the written agreement containing the arbitration provision, but there is no allegation that the arbitration provision itself was induced by fraud?

(2) Whether the United States Arbitration Act mandates a trial of the threshold issue of purported fraud, where it is alleged that fraud renders an arbitration agreement unenforceable?

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OPINIONS BELOW

The opinion of the court of appeal (Pet.App.A) is unreported, as is the order denying review by the Supreme Court of the State of California (Pet.App.B).

JURISDICTION

The opinion of the court of appeal was filed April 14, 1987. The order denying a petition for rehearing of that decision was filed May 12, 1987. The order of the Supreme Court of the State of California denying review after judgment by the court of appeal was filed July 15, 1987. Jurisdiction in this Court is invoked under 28 U.S.C.

§ 1257(3). *See Southland Corp. v. Keating*, 465 U.S. 1, 6-8 (1984); *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 482-83 (1975).

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved in this case are set forth in full in the appendix (Pet.App.C). The citations to the statutes and regulations are as follows:

United States Arbitration Act,
Section 2, 9 U.S.C. § 2
Section 3, 9 U.S.C. § 3
Section 4, 9 U.S.C. § 4

STATEMENT OF THE CASE

Plaintiff and respondent Billie L. Wederski (hereinafter "respondent") filed her complaint in the Superior Court of the State of California for the County of Orange against defendants and petitioners Dean Witter Reynolds Inc.[1] and Henry H. Duke (hereinafter "petitioners" or "Dean Witter" and "Duke"), and defendant Roger Morrison[2] (hereinafter "Morrison") on May 2, 1986. The complaint consists of four causes of action, all purportedly

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[1]Petitioner Dean Witter Reynolds Inc. is a wholly-owned subsidiary of Dean Witter Financial Services Inc., which is itself a wholly-owned subsidiary of Sears, Roebuck and Co.

[2]Roger Morrison, a former employee of petitioner Dean Witter, is a named defendant in the superior court action. Morrison joined in the motion to compel arbitration granted in the superior court. Morrison, however, neither responded in the court of appeal to respondent's petition for issuance of peremptory writ of mandate nor petitioned for rehearing in the court of appeal after the grant of that petition, nor petitioned for review of the court of appeal decision to the Supreme Court of the State of California. Morrison nevertheless remains a party in the superior court action.

arising under state law. Respondent denominates her causes of action as "Breach of Fiduciary Duties", "Fraud and Deceit", "Negligent Infliction of Emotional Distress", and "Negligence and Gross Negligence".

The allegations supporting respondent's causes of action include, *inter alia,* that respondent opened a securities account with Dean Witter through account executive Morrison, that respondent's funds were used to purchase speculative investments inconsistent with her needs, that Morrison engaged in unauthorized and excessive transactions in respondent's account, and that these alleged malefactions were accomplished with the knowledge and approval of Duke, a managing agent of Dean Witter.

In August of 1985, when respondent commenced doing business with Dean Witter, she entered into three written contracts governing the conduct of her securities account. Each of the contracts, the "Customer's Agreement" (Pet.App.D), the "Active Assets Account Agreement" (Pet.App.E), and the "Options Trading Agreement" (Pet.App.F), contains a provision requiring arbitration of any controversy arising out of the account.

In response to the complaint, Dean Witter and Duke filed a petition to compel arbitration and a motion to stay proceedings,[3] seeking an order compelling arbitration of respondent's causes of action and staying further proceedings in superior court pending completion of the arbitration. In support of their request that respondent's causes of action be arbitrated, Dean Witter and Duke relied on the written agreements executed by respondent and on the mandate of the United States Arbitration Act,

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[3]The documents filed by petitioners Dean Witter and Duke are entitled "Petition to Compel Arbitration" and "Notice of hearing on Petition to Compel Arbitration and Motion to Stay Proceedings."

9 U.S.C. § 1, *et seq.*. ("Arbitration Act"). Defendant Morrison joined in the petition and motion.

Respondent filed an opposition to the petition to compel arbitration and motion to stay proceedings. Her opposition contained an uncorroborated declaration in which she alleged that she was fraudulently induced to enter into the agreements which contained the arbitration provisions. Thereafter, Morrison filed a declaration controverting the allegations of the complaint and the assertions contained in respondent's declaration. Petitioners Dean Witter and Duke filed a reply memorandum to the opposition papers that included a declaration by Duke that also controverted the allegations of the complaint and respondent's declaration. The superior court entered its order on July 25, 1986 granting the petition to compel arbitration.

Subsequent to the superior court's order, respondent filed a petition for issuance of peremptory writ of mandate in the court of appeal. Dean Witter and Duke filed an opposition to the petition. On April 14, 1987, the court of appeal filed its opinion (Pet.App.A) granting the peremptory writ and ordering that the superior court vacate its order granting arbitration and enter a new order denying arbitration. Dean Witter and Duke filed a petition for rehearing that was denied by the court of appeal on May 12, 1987. A petition for review to the Supreme Court of the State of California filed by Dean Witter and Duke was denied by that court on July 15, 1987 (Pet.App.B).

In its opinion, the court of appeal concluded that the superior court erred in ordering arbitration. It stated: "Wederski's complaint alleged fraud induced her assent to *all* the brokerage documents. As in *Main* [*v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 67 Cal.App.3d 19, 136 Cal.Rptr. 378 (1977)], Wederski alleges Dean Witter

concealed the true nature and content of the documents it had her sign. The truth of her allegations must be determined judicially." Pet.App.A, at 5 (Emphasis in original.)

ARGUMENT

The "permeation doctrine" sounds the deathknell for enforcement of arbitration agreements in the State of California. As utilized by the Court of Appeal of the State of California in this case, the doctrine permits a party objecting to arbitration to avoid arbitration altogether by the simple expedient of alleging that fraud induced the party to execute the contract containing the arbitration provision. The doctrine conflicts not only with the express language of the Arbitration Act, but also with the holding of this Court in *Prima Paint Corp. v. Flood & Conklin,* 388 U.S. 395 (1967).

I

THIS COURT SHOULD GRANT A WRIT OF CERTIORARI TO DETERMINE WHETHER COURTS MAY INVOKE THE PERMEATION DOCTRINE TO REFUSE TO COMPEL ARBITRATION

A. The Decision of the California Court of Appeal Undermines the Arbitration Act by Permitting Any Party to Avoid Arbitration Merely Through Pleading.

The court of appeal utilized the "permeation doctrine" in concluding that solely because respondent alleged in her complaint that fraud induced her assent to "all of the brokerage documents" arbitration should be denied. (See Pet.App.A, at 5). Courts that follow the "permeation doctrine" hold that arbitration should be denied when bare allegations are made that fraud "permeated" an

entire agreement containing an arbitration provision. *Ford v. Shearson Lehman American Express, Inc.,* 180 Cal.App.3d 1011, 1018-19, 225 Cal.Rptr. 895 (1986); *Main v. Merrill Lynch, Pierce, Fenner & Smith, Inc.,* 67 Cal.App.3d 19, 27, 136 Cal.Rptr. 378 (1977).

The effect of the permeation doctrine is to undermine the Arbitration Act's directive that arbitration agreements within the purview of that Act are "valid, irrevocable and enforceable . . ." 9 U.S.C. § 2. Under the permeation doctrine, when a dispute first arises, a party can cleverly plead that it was "fraudulently induced" to enter into the agreement containing the arbitration provision, thereby avoiding arbitration. The result is that " 'the mere cry of fraud in the inducement [will] permit the frustration of the very purposes sought to be achieved by the agreement to arbitrate, *i.e.*, a speedy and relatively inexpensive trial before commercial specialists.' " *Ericksen, Arbuthnot, McCarthy, Kearney & Walsh, Inc. v. 100 Oak Street,* 35 Cal.3d 312, 318, 197 Cal.Rptr. 581 (1983) (emphasis omitted) (quoting *Robert Lawrence Co. v. Devonshire Fabrics, Inc.,* 271 F.2d 402, 410 (2d Cir. 1959), *cert. dismissed,* 364 U.S. 801 (1960)).

Since arbitration can be denied under the decision of the court of appeal by the "mere cry of fraud," any party dissatisfied with its bargain can subvert the arbitration agreement and avoid arbitration altogether by invoking the permeation doctrine. Such invocations, and the concomitant increase in litigation resulting from them, will become more frequent as parties who perceive advantages in judicial rather than arbitral resolution attempt to avoid their written contractual obligations.

B. The Decision of the Court of Appeal Conflicts with a Decision of This Court.

The permeation doctrine utilized by the court of appeal is contrary to federal law as established in *Prima Paint Corp. v. Flood & Conklin,* 388 U.S. 395 (1967). In *Prima Paint,* this Court considered whether a federal court or an arbitrator should resolve a claim of fraud in the inducement of an agreement containing an arbitration provision. This Court agreed with the conclusion of the Second Circuit in *Prima Paint*:

> [A] claim of fraud in the inducement of the contract generally — as opposed to the arbitration clause itself — is for the arbitrators and not for the courts; and . . . this rule — one of 'national substantive law' — governs even in the face of a contrary state rule.

388 U.S. at 400 (footnote omitted). The Court decided in *Prima Paint* that arbitrators, not courts, will hear claims of fraudulent inducement of a contract. The permeation doctrine, contrary to *Prima Paint,* permits a court to hold that a claim of fraudulent inducement of the contract generally can prevent arbitration.

The Court's decision in *Prima Paint* was based on the express language of § 4 of the Arbitration Act, 9 U.S.C. § 4. The Court noted:

> Under § 4, . . . the federal court is instructed to order arbitration to proceed once it is satisfied that 'the making of the agreement for arbitration or the failure to comply [with the arbitration agreement] is not in issue.' Accordingly, if the claim is fraud in the inducement of the arbitration clause itself — an issue which goes to the 'making' of the agreement to arbitrate — the federal court may proceed to adjudicate it. But the statutory language does not permit

> the federal court to consider claims of fraud in the inducement of the contract generally.

388 U.S. at 403-04 (footnotes omitted).

In contrast to the federal, statutory analysis engaged in by this Court in *Prima Paint*, the analysis at the core of the permeation doctrine is based on state law tort and contract principles. For example, in explaining the permeation doctrine the court in *Ford v. Shearson Lehman American Express, Inc.*, 180 Cal.App.3d at 1028-29, reasoned:

> Since Ford declares that his signature on the agreements was obtained involuntarily . . . the type of fraud he alleges is fraud in the inception. If this type of fraud is proven, the agreements would be void *ab initio* and the arbitration clause contained therein would fall.

In the instant case, the court of appeal similarly relied on cases applying state law principles in denying arbitration rather than on the federal, statutory analysis engaged in by this Court in *Prima Paint*.[4]

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[4]*Ford v. Shearson Lehman American Express, Inc.*, 180 Cal.App.3d at 1024; *Main v. Merrill Lynch, Pierce, Fenner & Smith*, 67 Cal.App.3d at 33 n.5. Other California Courts of Appeal have recognized that state law prinicples are inapplicable to the enforcement of arbitration clauses in contracts governed by the Arbitration Act. *See, e.g., Lewis v. Prudential Bache Securities, Inc.*, 179 Cal.App.3d 935, 941, 225 Cal.Rptr. 69 (1986); *Tonetti v. Shirley*, 173 Cal.App.3d 1144, 1148, 219 Cal.Rptr. 616 (1985). *But see Liddington v. The Energy Group, Inc.*, 192 Cal.App.3d 1520, 1527, 238 Cal.Rptr. 202 (1987) (construing dictum in *Perry v. Thomas*, ____ U.S. ____, 107 S.Ct. 2520, 96 L.Ed.2d 426, 437 n. 9 (1987) for the proposition that state contract law principles apply under the "savings clause" of 9 U.S.C. § 2 so long as they are not rules that apply solely to arbitration agreements).

Other state courts have held that the permeation doctrine is a state law creation that conflicts with federal law under *Prima Print.* For example, in *Dolomite, S.p.A. v. Beconta, Inc.,* 129 Misc. 2d 857, 493 N.Y.S.2d 705 (1985), a New York state court held that while the permeation doctrine is the law of New York, it conflicts with federal law under *Prima Print* and therefore is preempted by federal law. For that reason, the court declined to consider whether the plaintiff had raised an issue as to permeation in that case since "that is not a reason recognized under Federal law for removing the issue from arbitration, and leaving it to the court." 129 Misc. 2d at 859. *Accord Sentry Systems, Inc. v. Guy,* 98 Nev. 507, 654 P.2d 1008 (1982).

The conflict between the decision in the instant case applying the permeation doctrine to deny arbitration, and that of this Court in *Prima Paint* will encourage forum shopping. While a claim of fraudulent inducement to enter into a contract generally, as opposed to fraudulent inducement of the arbitration clause itself, is a matter for the arbitrators under *Prima Paint,* if courts follow the permeation doctrine the "mere cry of fraud" will result in a denial of arbitration. In striking down a California interpretation of the Arbitration Act which had a like effect in *Southland Corp. v. Keating,* 465 U.S. 15 (1984), this Court noted:

> We are unwilling to attribute to Congress the intent, in drawing on the comprehensive powers of the Commerce clause, to create a right to enforce an arbitration contract and yet make the right dependent for its enforcement on the particular forum in which it is asserted.

The court of appeal decision in this case similarly makes the right to enforce a written arbitration agreement dependent on the particular forum in which it is

asserted: a claim of fraud in the inducement of the contract will be resolved in arbitration if that claim is asserted in federal court, while the same claim is sufficient to deny arbitration under the permeation doctrine if asserted in a California state court.

Since the decision of the court of appeal in this case conflicts with the decision of this Court in *Prima Paint Corp. v. Flood & Conklin,* 388 U.S. 395 (1967), and will encourage forum shopping, review of its decision by this Court is warranted.

II

THIS COURT SHOULD GRANT A WRIT OF CERTIORARI TO DETERMINE WHETHER A COURT MUST ORDER A TRIAL OF THE THRESHOLD ISSUE OF FRAUD WHEN A PARTY ALLEGES THAT IT WAS FRAUDULENTLY INDUCED TO ENTER INTO AN ARBITRATION AGREEMENT

A. The Decision of the Court of Appeal Requires an Exercise of this Court's Power of Supervision Because Federal Law Mandates a Trial of the Threshold Issue of Fraud if the Making of an Agreement to Arbitrate is in Issue.

In the instant case, the court of appeal directed the Orange County Superior Court "to vacate its order compelling arbitration and to enter a new order denying defendants' motion [to compel arbitraton and for a stay of proceedings]." Pet.App.A, at 5-6. However, under Section 4 of the Arbitration Act a party seeking arbitration is entitled to a summary trial "[i]f the making of the arbitration agreement . . . be in issue . . . ." Section 4 of the Arbitration Act provides:

> If the making of the arbitration agreement . . . be in issue, the court *shall* proceed summarily to the trial

> thereof. If no jury be demanded by the party alleged to be in default . . . the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may . . . demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure, or may specially call a jury for that purpose. If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.

9 U.S.C. § 4 (emphasis added). Thus, even if the court of appeal was correct in ordering the denial of petitioners' motion to compel arbitration based on respondent's uncorroborated allegations of fraud, petitioners were entitled to an order that a trial of the fraud allegations be had prior to judicial proceedings on the merits of respondent's claims.[5]

The right to a summary trial of any issue of fraud in the inducement of an arbitration agreement was recognized by this Court in *Prima Paint Corp. v. Flood & Conklin*, 388 U.S. 395, 403-04 (1967). Moreover, in the very cases upon which the court of appeal relied in the instant case for its

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[5]While the court of appeal in the instant case seemed to imply that a threshold trial of respondent's fraud allegations was required, see Pet.App.A, at 6, no reference in the opinion was made to such a trial. Further, the court of appeal was requested to provide for such a trial in petitioners' petition for rehearing filed in the court of appeal. The petition for rehearing was denied without comment.

application of the permeation doctrine, trials of the threshold issue of fraud were ordered. *Ford v. Shearson Lehman American Express, Inc.*, 180 Cal.App.3d 1011, 1029, 225 Cal.Rptr. 895 (1986); *Main v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 67 Cal.App.3d 19, 33, 136 Cal.Rptr. 378 (1977).

The Arbitration Act expressly requires a summary trial of any issue concerning the making of an arbitration agreement within the scope of the Act. Furthermore, this Court in *Prima Paint* construed the Arbitration Act to require such a trial. Since the court of appeal concluded that an issue had been raised as to the making of the agreements to arbitrate in the instant case, yet refused to order a summary trial of the issue, the decision of the court of appeal calls for an exercise of this Court's power of supervision.

B. The Decision of the Court of Appeal Concerns a Matter of Considerable Public Importance Since the Right to Enforce Arbitration Agreements will be Illusory if Untested and Uncorroborated Allegations are a Sufficient Basis to Avoid Arbitration.

Under the decision of the court of appeal in the instant case, untested and uncorroborated allegations are a sufficient basis to avoid arbitration. The consequences of such a rule of law on the sanctity of contracts, and in particular on agreements to arbitrate, are serious and pervasive. In direct contravention of the express purpose of the Arbitration Act — to place an arbitration agreement "upon the same footing as other contracts, where it belongs," *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 219, (1985) (quoting H.R.Rep.No. 96, 68th Cong., 1st Sess., 1 (1924)) — the decision of the court of appeal diminishes the rights of parties to arbitration agreements as compared with other types of contracts. With respect to any other assertion of a contr.. tual right, a party has a

concomitant right to have the assertion determined by a finder of fact. In contrast, under the court of appeal decision in this case an allegation alone constitutes a sufficient basis for the determination that a contractual right does not exist.

The result of this refusal to test allegations of fraud in the making of agreements to arbitrate is that agreements to arbitrate no longer will be enforced. As parties become aware that the "mere cry of fraud" will permit them to avoid their contractual commitments, they will do so.

The public importance of this issue is also evident in the impact which the court of appeal decision will have on litigation in both state and federal courts. To the extent that mere allegations of fraud in the inducement result in refusals to enforce arbitration agreements, parties will seek judicial resolution of their disputes in lieu of the arbitration for which they contracted. Increases in judicial workloads and strain to the justice system will result.

In light of the importance of the decision of the court of appeal to the enforcement of arbitration agreements under the Arbitration Act, and the impact of the decision on judicial caseloads, review of the decision by this Court is warranted.

III

CONCLUSION

A review of the decision of the court of appeal in the instant case will resolve an important question of federal law concerning the enforcement of arbitration agreements, constitute a proper and necessary exercise of this Court's power of supervision and address an issue that will substantially impact state and federal judicial caseloads. For these reasons, petitioners Dean Witter Reynolds Inc. and Henry H. Duke respectfully request that this petition for writ of certiorari to the Court of Appeal of the State of California, Fourth Appellate District, Division Three be granted.

DATED: October 13, 1987

Respectfully submitted,

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APPENDIX A

G004574
(Super. Ct. No. 48-85-63)

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION THREE

BILLIE L. WEDERSKI,
Petitioner,

v.

SUPERIOR COURT, ETC.,
COUNTY OF ORANGE,
Respondent,

DEAN WITTER REYNOLDS, INC., et al.,
Real Parties in Interest.

OPINION

NOT TO BE PUBLISHED

Filed April 14, 1987.

ORIGINAL PROCEEDING; application for writ of mandate. Peremptory writ granted.

Kircher & Nakazato, Arthur Nakazato, Greenwald & Resnick, and Barnet Resnick for Petitioner.

No appearance for Respondent.

Jones, Bell, Simpson & Abbott, Eugene W. Bell, and Craig R. Bockman for Real Parties in Interest Dean Witter Reynolds, Inc. and Henry H. Duke.

Petitioner Billie Wederski seeks a writ of mandate ordering the superior court to vacate its order compelling arbitration.[1]

In December 1984, Wederski decided to buy some stock in Wespercorp, her employer. She had never purchased or sold securities before. She telephoned Roger Morrison, a stockbroker at Dean Witter Reynolds ("Dean Witter"). He purchased 1000 shares for her at a cost of $825 including commission.

Thereafter, Morrison telephoned Wederski once or twice a month seeking additional business, to no avail. However, in July 1985, Wederski received $695,000 from her mother's estate. She telephoned Morrison for advice, explaining she had quit her job and wanted to live off the income from the bequest. He told her he had an investment plan he would like to discuss with her.

Morrison met Wederski for the first time when he accompanied her to Modesto to retrieve the $695,000. His "no risk" investment plan involved U.S. Treasury obligations, the "safest investment you could make," using options to "hedge" the investment, with "no risk involved."

That evening, Wederski deposited the entire $695,000 with Dean Witter. Morrison asked her to sign several documents containing risk disclosures and arbitration provisions. Morrison told Wederski she needn't read the forms, as they were merely unimportant formalities required to open her investment account. Wederski signed the forms without reading them.

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[1]An order compelling arbitration is nonappealable; a writ of mandate is the appropriate remedy. (*Wheeler* v. *St. Joseph Hospital* (1977) 63 Cal.App. 3d 345, 353.)

The next day, August 9, 1985, Wederski met with Henry Duke, Morrison's supervisor at Dean Witter. They discussed her investment objectives, but Wederski claims neither Morrison nor Duke mentioned the arbitration clauses, or explained anything about the serious risks involved in option trading.

During the next seven months, Morrison allegedly "churned" the account, making 215 trades totalling over $26,000,000 in value. During this period, Wederski received weekly status reports which indicated her principal was intact, while in reality she was losing money rapidly.

In early March 1986, Wederski discovered Dean Witter had lost all her money. In fact, Dean Witter claimed she owed it $149,996 due to margin losses.

On May 2, 1986, Wederski filed suit against Dean Witter, Morrison, and Duke ("defendants"). Defendants moved to compel arbitration. The court granted the motion, and Wederski petitioned this court for a writ of mandate.

Main v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.* (1977) 67 Cal.App.3d 19 is directly on point.[2] The plaintiff in *Main*, an elderly and unsophisticated woman, opened an account with Merrill Lynch. She alleged Merrill Lynch had her sign documents, telling her they were unimportant formalities, when they were actually vital disclosure statements containing arbitration clauses. In determining whether the initial fraud question was subject to arbitration, the court held that "where it is alleged that fraud either induced the arbitration clause itself or

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[2]Like this case, *Main* involved interpretation of federal law, namely the Federal Arbitration Act (9 U.S.C. § 2, et seq.). Federal law applies to this case because it involves interstate securities transactions.

permeated the entire agreement including the arbitration clause, that issue will be determined judicially and not by arbitration." (*Id.*, at p. 27.) The court in *Main* found the complaint's fraud allegations were sufficient to preclude arbitration of the initial fraud question. (*Id.*, at pp. 27-29.)

The holding in *Main* was cited with approval in *Eriksen, Arbuthnot, McCarthy, Kearney & Walsh, Inc.* v. *100 Oak Street* (1983) 35 Cal.3d 312. The question in *Eriksen* was whether an arbitration panel should decide "a party's claim that the underlying agreement (as distinguished from the agreement to arbitrate) was procured by fraud.[3] (*Id.*, at p. 316.) The court held that "claims of fraud in the inducement of the contract (as distinguished from claims of fraud directed to the arbitration clause itself) will be deemed subject to arbitration.[8]" (*Id.*, at p. 323.) However, footnote 8 in *Eriksen* states, "[a]s was observed in *Main* . . . fraud which 'permeate[s] the entire contract including the arbitration provision' vitiates the arbitration agreement and requires judicial determination. [Citations.]" (*Id.*, at p. 323, fn. 8.) Footnote 8 continues, stating that the permeation doctrine did not apply in *Eriksen* because the plaintiff was aware of the arbitration provision and the alleged fraud did not reach that portion of the contract. (*Ibid.*)

Main was again confirmed in *Ford* v. *Shearson Lehman American Express, Inc.* (1986) 180 Cal.App.3d 1011.[4]

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[3]*Eriksen* involved a lessee's allegations that its lessor procured the underlying lease through fraudulent representations. Although federal law was not directly involved, the court interpreted state law by reference to federal case law.

[4]Ford alleged Shearson conspired with his bookkeeper and therapist in a scheme to convert his stock portfolio to their personal use.

Ford reviewed the legal landscape, concluding that two groups of cases existed. The first group, exemplified by *Eriksen* and *Prima Paint Corp.* v. *Flood & Conklin Mfg. Co.* (1967) 388 U.S. 395, "do not present the type of fraud which goes to the making or procurement of a contract. Rather, these decisions deal with the type of fraud in the inducement of a contract which goes to performance under a contract [constituting] a 'disappointed expectation' concerning such performance." (*Ford* v. *Shearson Lehman American Express, Inc., supra,* 180 Cal.App.3d at P. 1022.) The second group, exemplified by *Main* and *Moseley* v. *Electronic Facilities* (1963) 374 U.S. 167, concern fraud which either procured the arbitration clause itself or which permeates the entire contract containing the arbitration clause. In such cases, "the determination of whether such fraud . . . ever occurred must be initially determined by a court and not by arbitration." (*Ford* v. *Shearson Lehman American Express, Inc., supra,* 180 Cal.App.3d at p. 1023.)

Here, Wederski's complaint alleged fraud induced her assent to *all* the brokerage documents. As in *Main,* Wederski alleges Dean Witter concealed the true nature and content of the documents it had her sign. The truth of her allegations must be determined judicially. "To allow this question to be decided by arbitrators would be to that extent to enforce the arbitration agreement even though steeped in the grossest kind of fraud." (*Moseley* v. *Electronic Facilities, supra,* 374 U.S. 167, conc. opn. of Warren, C.J., at p. 172.) The court therefore erred in ordering arbitration.

Let a peremptory writ of mandate issue (*Palma* v. *U.S. Industrial Fasteners, Inc.* (1984) 36 Cal.3d 171, 182)

Shearson sought to enforce the arbitration provisions in contracts Ford claimed were procured by fraud.

directing respondent Orange County Superior Court to vacate its order compelling arbitration and to enter a new order denying defendants' motion.

NOT TO BE PUBLISHED

Trotter /s/

TROTTER, P. J.

We concur:

By Wallin /s/

WALLIN, J.

By Sonenshine /s/

SONENSHINE, J.

APPENDIX B

ORDER DENYING REVIEW

AFTER JUDGMENT BY THE COURT OF APPEAL
4th District, Division 3, No. G004574
S000983

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

WEDERSKI,
Petitioner,

v.

SUPERIOR COURT OF THE COUNTY OF ORANGE,
Respondent,
DEAN WITTER REYNOLDS, INC., et al.,
Real Parties in Interest.

Filed July 15, 1987.

Petition for review of Real Parties in Interest DENIED.

Panelli, J., is of the opinion the petition should be granted.

LUCAS
Chief Justice

APPENDIX C

STATUTES AND REGULATIONS INVOLVED

United States Arbitration Act

9 U.S.C. §2:

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. §3:

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

9 U.S.C. §4:

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of

the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil Procedure. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure, or may specially call a jury for that purpose. If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.

APPENDIX D

CUSTOMER'S AGREEMENT

Gentlemen:

In consideration of your accepting one or more accounts of the undersigned (whether designated by name, number or otherwise) and your agreeing to act as brokers for the undersigned in the purchase or sale of securities or commodities, the undersigned agrees as follows:

1. All transactions under this agreement shall be subject to the constitution, rules, regulations, customs and usages of the exchange or market, and its clearing house, if any, where the transactions are executed by you or your agents, and, where applicable, to the provisions of the Securities Exchange Act of 1934, the Commodities Exchange Act, and present and future acts amendatory thereof and supplemental thereto, and the rules and regulations of the Federal Securities and Exchange Commission, the Board of Governors of the Federal Reserve System and of the Secretary of Agriculture in so far as they may be applicable.

2. Whenever any statute shall be enacted which shall affect in any manner or be inconsistent with any of the provisions hereof, or whenever any rule or regulation shall be prescribed or promulgated by the New York Stock Exchange, the Federal Securities and Exchange Commission, the Board of Governors of the Federal Reserve System and/or the Secretary of Agriculture which shall affect in any manner or be inconsistent with any of the provisions hereof, the provisions of this agreement so affected shall be deemed modified or superseded, as the case may be, by such statute, rule or regulation, and all other provisions of the agreement and the provisions as so

modified or superseded, shall in all respects continue and be in full force and effect.

3. Except as herein otherwise expressly provided, no provision of this agreement shall in any respect be waived, altered, modified or amended unless such waiver, alteration, modification or amendment be committed to writing and signed by a member of your organization.

4. All monies, securities, commodities or other property which you may at any time be carrying for the undersigned or which may at any time be in your possession for any purpose, including safekeeping, shall be subject to a general lien for the discharge of all obligations of the undersigned to you, irrespective of whether or not you have made advances in connection with such securities, commodities or other property, and irrespective of the number of accounts the undersigned may have with you.

5. All securities and commodities or any other property, now or hereafter held by you, or carried by you for the undersigned (either individually or jointly with others), or deposited to secure the same, may from time to time and without notice to me, be carried in your general loans and may be pledged, re-pledged, hypothecated or re-hypothecated, separately or in common with other securities and commodities or any other property, for the sum due to you thereon or for a greater sum and without retaining in your possession and control for delivery a like amount of similar securities or commodities.

6. Debit balances of the accounts of the undersigned shall be charged with interest, in accordance with your usual custom, and with any increase in rates caused by

money market conditions, and with such other charges as you may make to cover your facilities and extra services.

7. You are hereby authorized, in your discretion, should the undersigned die or should you for any reason whatsoever deem it necessary for your protection, to sell any or all of the securities and commodities or other property which may be in your possession or which you may be carrying for the undersigned (either individually or jointly with others), or to buy in any securities, commodities or other property of which the account or accounts of the undersigned may be short, or cancel any outstanding orders in order to close out the account or accounts of the undersigned in whole or in part or in order to close out any commitment made in behalf of the undersigned. Such sale, purchase or cancellation may be made according to your judgment and may be made, at your discretion, on the exchange or other market where such business is then usually transacted, or at public auction or at private sale, without advertising the same and without notice to the undersigned or to the personal representatives of the undersigned, and without prior tender, demand or call of any kind upon the undersigned or upon the personal representatives of the undersigned, and you may purchase the whole or any part thereof free from any right of redemption, and the undersigned shall remain liable for any deficiency; it being understood that a prior tender, demand or call of any kind from you, or prior notice from you, of the time and place of such sale or purchase shall not be considered a waiver of your right to sell or buy any securities and/or commodities and/or other property held by you, or owed you by the undersigned, at any time as hereinbefore provided.

8. The undersigned will at all times maintain margins for said accounts, as required by you from time to time.

9. The undersigned undertakes, at any time upon your demand, to discharge obligations of the undersigned to you, or, in the event of a closing of any account of the undersigned in whole or in part, to pay you the deficiency, if any, and no oral agreement or instructions to the contrary shall be recognized or enforceable.

10. In case of the sale of any security, commodity, or other property by you at the direction of the undersigned and your inability to deliver the same to the purchaser by reason of failure of the undersigned to supply you therewith, then and in such event, the undersigned authorizes you to borrow any security, commodity, or other property necessary to make delivery thereof, and the undersigned hereby agrees to be responsible for any loss which you may sustain thereby and any premiums which you may be required to pay thereon, and for any loss which you may sustain by reason of your inability to borrow the security, commodity, or other property sold.

11. At any time and from time to time, in your discretion, you may without notice to the undersigned apply and/or transfer any or all monies, securities, commodities and/or other property of the undersigned interchangeably between any accounts of the undersigned (other than from Regulated Commodity Accounts).

12. It is understood and agreed that the undersigned, when placing with you any sell order for short account, will designate it as such and hereby authorizes you to mark such order as being "short", and when placing with you any order for long account, will designate it as such and hereby authorizes you to mark such order as being "long". Any sell order which the undersigned shall designate as being for long account as above provided, is for securities then owned by the undersigned and, if such securities are not then deliverable by you from any ac-

count of the undersigned, the placing of such order shall constitute a representation by the undersigned that it is impracticable for him then to deliver such securities to you but that he will deliver them as soon as it is possible for him to do so without undue inconvenience or expense.

13. In all transactions between you and the undersigned, the undersigned understands that you are acting as the brokers of the undersigned, except when you disclose to the undersigned in writing at or before the completion of a particular transaction that you are acting, with respect to such transaction, as dealers for your own account or as brokers for some other person.

14. Reports of the execution of orders and statements of the accounts of the undersigned shall be conclusive if not objected to in writing, the former within two days, and the latter within ten days, after forwarding by you to the undersigned by mail or otherwise.

15. Communications may be sent to the undersigned at the address of the undersigned given below, or at such other address as the undersigned may hereafter give you in writing, and all communications so sent, whether by mail, telegraph, messenger or otherwise, shall be deemed given to the undersigned personally, whether actually received or not.

16. Any controversy between you and the undersigned arising out of or relating to this contract or the breach thereof, shall be settled by arbitration, in accordance with the rules, then obtaining, of either the Arbitration Committee of the Chamber of Commerce of the State of New York, or the American Arbitration Association, or the Board of Arbitration of the New York Stock Exchange, as the undersigned may elect. If the undersigned does not make such election by registered mail addressed to you at

your main office within five (5) days after receipt of notification from you requesting such election, then the undersigned authorizes you to make such election in behalf of the undersigned. Any arbitration hereunder shall be before at least three arbitrators and the award of the arbitrators, or of a majority of them, shall be final, and judgment upon the award rendered may be entered in any court, state or federal, having jurisdiction.

17. This agreement and its enforcement shall be governed by the laws of the State of New York and its provisions shall be continuous; shall cover individually and collectively all accounts which the undersigned may open or re-open with you, and shall enure to the benefit of your present organization, and any successor organization, irrespective of any change or changes at any time in the personnel thereof, for any cause whatsoever, and of the assigns of your present organization or any successor organization, and shall be binding upon the undersigned and/or the estate, executors, administrators and assigns of the undersigned.

18. The undersigned, if an individual, represents that the undersigned is of full age, that the undersigned is not an employee of any exchange, or of any corporation of which any exchange owns a majority of the capital stock, or of a member of any exchange, or of a member firm or member corporation registered on any exchange, or of a bank, trust company, insurance company or of any corporation, firm or individual engaged in the business of dealing, either as broker or as principal, in securities, bills of exchange, acceptances or other forms of commercial paper. The undersigned further represents that no one except the undersigned (and, to the extent community property stands in the account or accounts, his or her

spouse) has an interest in the account or accounts of the undersigned with you.

19. The undersigned acknowledges receipt of your statement of interest charges.

Dated, 8-8-85

Very truly yours,
Billie L. Wederski

CUSTOMER'S LOAN CONSENT

Until you receive written notice of revocation from the undersigned, you are hereby authorized to lend, to yourselves as brokers or to others, any securities held by you on margin for the account of, or under the control of, the undersigned.

Dated, 8-8-85

Very truly yours,
Billie L. Wederski

APPENDIX E

ACTIVE ASSETS ACCOUNT AGREEMENT

Note to clients of Active Assets Accounts for Businesses, Non-Profit Organizations and Institutions: Customers who are prohibited from trading on margin, please check the cash box to your right and circle which type of account you are opening.

☐ cash

Account Type (circle): Corporations, Partnerships, Sole Proprietorships, Foundations/Charitable, Custodian, Conservatorship/Guardianships, Estates and Trusts. Individuals must open a margin account.

I request that Dean Witter Reynolds Inc. ("you") accept an Active Assets Account in my name as it appears below. I understand that an Active Assets Account links three financial components: A margin Account ("Margin Account") — Part I of this Agreement; or a conventional cash brokerage account ("Cash Account") — Part 1A of this Agreement; (The Margin Account and the Account are collectively referred to as the "Securities Account"); a Visa check/card account ("Visa Account") with Bank One, Columbus, N.A. (the "Bank") — Part II of this Agreement; and a selection of one of three no-load money market funds ("Active Assets Trusts") or a Federal Savings & Loan Insurance Corporation ("FSLIC") insured Super-Now Account ("Active Assets Insured Account") at Sears Savings Bank ("SSB") — Part III of this Agreement.

In order to complete my application for an Active Assets Account with you, I am applying to the Bank for a Visa Account and request that the Bank provide checks ("Checks") and/or one or more cards ("Card") for use with my Visa Account. I understand that before you

accept my application to open an Active Assets Account, the Bank must accept my application to open a Visa Account. The Bank will notify me of such acceptance by providing me with Checks and/or issuing me a Card.

I acknowledge and agree that the Active Assets Account Agreement ("Agreement") sets forth the terms and conditions that will govern the Active Assets Account financial services to be provided to me. I understand that this Agreement includes the following: (1) My Margin Account Agreement and Customer's Loan Consent (Part I and Part IV, respectively) or if I open a Cash Account (Part IA and IV, respectively); (2) the Visa Account Agreement (Part II); and (3) I also understand that by signing this Agreement, I am acknowledging receipt of the Active Assets Trusts' Prospectus ("Prospectus") for the money market fund which I select as my primary fund and I understand that I will receive a separate disclosure document from SSB for the Active Assets Insured Account (Part III).

Part I. Margin Account Agreement

Purchase and Sales of Securities. You will open a margin account for me and will act as my broker, upon my instruction, to purchase or sell securities, including options, commodities, commodities futures, on margin or otherwise.

Security Interest and Liquidation. If at any time I should owe you any money for transactions in my Margin Account or any other account I may maintain with you, or for any loans you make for me, you will be entitled to a security interest on any money, securities or other property you hold for me to assure the repayment of my debt to you. If you feel you need to protect yourself in assuring payment of any of my indebtedness to you or to meet a

margin call, you may take any one or more of the following actions: (1) redeem shares I owe in any Active Assets Trust; (2) transfer securities or money from my Margin Account to any other account I maintain with you or transfer any securities, commodities or other property from any such other account to my Margin Account; and (3) sell securities or other property held in any of my accounts with you. You may also use the money in any of my accounts to satisfy my indebtedness to you. Before taking any action enumerated above, you will attempt to give me reasonable notice, but you will not be stopped from taking action if you have not notified me. You may also buy in any securities or other property that I am committed to deliver to you, or to cancel any outstanding orders in order to satisfy any commitment you may have made on my behalf.

You may make any such sale, purchase or cancellation according to your judgment and, in your discretion, on any exchange or in any market where such business is transacted, or at public auction or private sale. You may purchase the whole or any part of such securities or other property free from any right of redemption and I shall remain liable for any deficiency. All of the above may be done without demand for margin or notice of purchase or sale; any such notice or demand is expressly waived and no specific demand or notice shall invalidate this waiver.

Pledge. I understand that you may borrow money from banks to relend to your margin account customers, including me, and that you may pledge your customer's securities and other assets as collateral for such bank loans. I give you my permission to pledge my securities and other assets, together with assets of other margin account customers as collateral for your bank loans

whether or not I have outstanding any loans from you at that time.

Margin Maintenance — Charges. I will at all times maintain such collateral (called "margin") for my account(s) as you may require. I understand that any debit balances (money owed) in the account shall be charged interest in accordance with your house requirements which may be changed or modified at any time. At any time you demand, I will be reponsible and discharge my obligations and promptly pay you any debit balance that might arise due to the closing of my account.

Short Sales. Whenever I place with you any order to sell short a security in my account, which means to sell a security I do not own, I will designate it as a "short sale" order and authorize you to mark it as such. Whenever I place with you an order to sell securities I own, which is a "long" sale, I will designate it as such and authorize you to mark such order as being a "long sale". If for some reason the securities are not then deliverable by you from any of my accounts, I understand I am obligated to deliver them promptly to you.

In case you sell any securities or other property at my direction and are unable to deliver the same to the purchaser by reason of my failure to supply them to you, I authorize you to borrow any security or other property necessary to make such delivery. I also agree to be responsible to pay for any resulting loss to you and any premiums which you may be required to pay for such borrowing. Additionally, I will pay you for any loss which you may sustain by reason of your inability to borrow the security or other property I have sold.

Liability for Costs of Collection. I agree to pay you the reasonable costs and expenses of collection, including attorneys' fees, for any balance in my Margin Account.

I hereby consent and agree to all of the terms and conditions of the Agreement appearing above and as continued on the reverse hereof.

Billie L. Wederski — 8-8-85
Signature of Customer — Date

SIGNATURES: SPECIAL ACCOUNTS: FOR USE BY CORPORATIONS, PARTNERSHIP, SOLE PROPRIETORSHIPS, FOUNDATIONS/CHARITABLE, CUSTODIAN, CONSERVATORSHIP/GUARDIANSHIPS, ESTATES AND TRUSTS

The undersigned represents and warrants that he or she has the authority ("Authority Person") to open this Active Assets Account, to place assets in it and to use the Assets of the named organization in accordance with the required documentation that the undersigned has supplied to Dean Witter Reynolds Inc.

NOTICE: The Ohio laws against discrimination require that all creditors make credit equally available to all credit worthy customers and that credit reporting agencies maintain separate credit histories on each individual upon request. The Ohio Civil Rights Commission administers compliance with this law.

CUSTOMER'S LOAN CONSENT

You are hereby authorized to lend, to yourselves as brokers or to others, any securities held by you on margin for me until you receive written notice of revocation signed by me.

Billie L. Wederski
Signature of Customer

8-8-85
Date

(If More Than One, All Principals to the Account Must Sign)

Date

Part IA. The Cash Account Agreement

For Corporations, Partnerships, Sole Proprietorships, Foundations/Charitable, Custodian, Conservatorship/Guardianships, Estates and Trusts.

Purchase and Sale of Securities. You will open a securities account for me and will act as my broker, upon my instructions, to purchase or sell securities including options on a cash basis.

Operation of a Cash Account within Active Assets Account. I understand that all transactions in my Active Assets Account will be on a cash basis. This means I will not be permitted to borrow funds from DWR against the securities in my account. I agree to the above because my corporate charter (or legal type of account) will not permit me to open a margin account.

I understand and agree that my available credit will be calculated on the aggregate amount of cash that is invested in my money market funds or, if applicable, the balance in my Active Assets Insured Account and any uninvested free credit balances in my account.

Should the above funds be insufficient to satisfy all money I owe on the Visa Account, the Bank may advance the balance as an overdraft and will impose a charge at an annual rate of up to 25% for the time such Visa Account is overdrawn, in accordance with Part II of this Agreement and the Terms and Conditions specified by the Bank. Any overdraft, including the charge, will be due and payable to the Bank immediately.

Part II. The Checking/Visa Account Agreement

Use of Checks/Cards. I may write Checks on the Visa Account and/or use the Card to make purchases of merchandise, services and to receive cash advances. I

agree that by signing, using or permitting another to use the Checks or Card, I will be bound by the Terms and Conditions provided to me by the Bank, as described below in this Part II.

Authorization Limit. The total amount available in my Visa Account ("Authorization Limit") will be the sum of (i) any uninvested free credit balances in my Account, (ii) the net asset value of my Trust shares, if any, and (iii) the available margin loan value (amount I can borrow from you) of any securities in my Account and, if any, the balance in Active Assets Insured Account at SSB. I understand that my Authorization Limit is dependent upon the clearance of the checks I deposited to the Securities Account, as well as the market value of my securities and the status of transactions in the Securities Account, Visa Account and Active Assets Insured Account. Because of the above variables, my Authorization Limit will fluctuate from day to day.

Payments. Whenever I use the Card to pay for merchandise or services, or to obtain a cash advance, I will sign a transaction draft, as evidence of the transaction, which will be forwarded to the Bank for payment. In addition, each time I write a Check against the Account, the Check will be forwarded to the Bank for payment. Unlike standard credit card account procedures where bills are rendered monthly, the Bank will notify you daily as to the amount of any Card or Check charges to the Visa Account received and paid by the Bank. You will promptly make payment to the Bank for me to the extent that sufficient funds can be provided: first, from any uninvested free credit balances in my Securities Account; second, from the proceeds of redemption of my available Trust shares or withdrawal from my Active Assets Insured Account, and third, if I maintain a Margin Account

and should such sources prove insufficient, from margin loans made by you for my account within the available margin loans of any securities in my Margin Account. If you do advance such monies, such amount will be a loan by you to me and will be collateralized by securities in my Margin Account. If you extend credit to me, interest will be charged from the day you make payment to the Bank on my behalf at the same rate you generally charge for margin loans.

Overdrafts. In the event a transaction exceeds my Authorization Limit, the Bank may accept such transaction as an overdraft on my Visa Account which will then become immediately due and payable to the Bank, with all interest due at a rate of 25% per annum for the period my Visa Account is overdrawn until paid in full.

Terms and Conditions. I understand that the Bank will send me a statement of the terms and conditions of the Visa Account ("Terms and Conditions") and that use of the Card and/or Checks will constitute my acceptance of and agreement to be bound by, such Terms and Conditions. I further understand that I may not use the Card and/or Checks until I receive the Terms and Conditions and I agree to notify the Bank in the event that I do not receive the same.

Part III. Investment Options
A. The Active Assets Trusts

Selection of Trust. When I open my Active Assets Account, I will designate one of three Active Assets Trusts as my primary fund. I acknowledge the receipt of a copy of the Trusts' Prospectus ("Prospectus") by signing this Agreement. A summary description of the components of the Active Assets Account Program and an

explanation of the Trusts operations accompanies the Prospectus.

Investments. Free credit balances in my Securities Account (that is, any cash that may be transfered out of the Securities Account without giving rise to interest charges) will automatically be invested in my designated Trust shares daily by means of a purchase offer submitted to the Trust by you in accordance with the terms of the Prospectus. The purchase price for Trust shares will be the net asset value per share next determined after a purchase order is entered with the Trust. A purchase order need not be entered until free credit balances or cash in the form of Federal funds becomes available to you. You may, however, without charge, advance Federal funds to the Trust on my behalf to enable me to purchase Trust shares and earn Trust dividends prior to final collection of checks deposited to my Securities Account. Also, you may reasonably withhold my access to redemption proceeds of Trust shares purchased with funds so advanced until you are satisfied that any and all checks deposited to my Securities Account have been collected.

Dividends. The Trust will declare dividends daily on Trust shares and will reinvest daily any such dividends in Trust shares. An investment in Trust shares is not equivalent to a bank deposit. As with any investment in securities, the value of my investment in Trust shares may fluctuate.

Shares. Trust shares will be maintained on the register of the Trust. Certificates will not be physically issued.

Redemptions. Trust shares will be redeemed at their net asset value. I agree that Trust Shares shall automatically be redeemed to satisfy debit balances in my Securities Account or amounts owing in my Visa Account.

B. Active Assets Insured Account

Active Assets Insured Account at Sears Savings Bank. When I open my Active Assets Account, I understand that I also have the option to place my cash balances in a FSLIC insured Super-Now account held on deposit at SSB instead of designating one of the three Active Assets Trusts as the vehicle for automatically investing my free credit balances in my account. I agree to allow and appoint Dean Witter Reynolds Inc. as my agent in any transactions with SSB. I understand and agree that the terms and conditions governing the Active Assets Insured Account, are set forth in a separate disclosure document which will be forwarded to me if I open an Active Assets Insured Account. I also agree to be bound by the terms and conditions of the Active Assets Insured Account.

Part IV. General

Fees and Charges. I will pay you an annual administrative fee, which is subject to change for the Active Assets Account program. In addition, I will pay you normal brokerage fees for transactions in the Securities Account. I will also pay the standard customer processing fee(s) for any stop payment order and for any Check returned for insufficient funds. I agree that you have the right to impose additional fees for special services in connection with the Active Assets Account. All such fees and charges shall be debited to my Securities Account. No fee, commission or other charge will be made with respect to the purchase or redemption of Trust shares. I understand you will receive a fee for acting as each Trusts investment manager and that you also will receive a fee from SSB for acting as my agent. In addition, I understand that you reserve the right to impose a monthly service charge to my Active Assets Account for Busi-

nesses, Non-Profit Organizations and Institutions if my portfolio asset value falls below $5,000.

Periodic Reports. Each month I will receive a transaction statement from you. This statement will detail all transactions in my Securities Account, margin interest charges, if any, the number of Trust shares purchased or redeemed for me, my Active Assets Insured Account balance and all purchases of merchandise and services and cash advances made with the Card and Checks. My cancelled Checks and Card transaction receipts will not be returned to me. Once a year, the amount of the annual fee for the Active Assets Account will be indicated on my monthly statement. I will carefully review each monthly statement after receipt and promptly notify you of any errors.

Arbitration of Controversies. Any controversy between you and me arising out of or relating to this Agreement, or any breach of the Agreement, shall be settled by arbitration in accordance with the rules of the Board of Arbitration of the New York Stock Exchange, the American Arbitration Association or any other industry association. Judgment upon the award rendered may be entered in any court, state or federal, having jurisdiction.

Representations. I represent to you that I have reached the age of majority in the State where I live. I also represent that I will inform you if I am or become an employee, principal or otherwise associated with any securities or commodities exchange or a member firm or their affiliate, or any bank, trust company, insurance company, or any brokerage firm or corporation, association or individual engaged in the business of dealing in securities or commodities or any forms of commercial paper.

Termination of Active Assets Account Program. I may terminate my Active Assets Account at any time. Of course, I will remain responsible for any charges to my Securities Account or Visa Account, whether arising before or after termination. You may terminate or place limitations on my Active Assets Account services which include my Securities Account checking or Visa privileges at any time in your discretion. If my Active Assets Account is terminated, either by you or me, I will promptly return all unused Checks and Card(s) to you. I understand that if I fail to return the Checks and Card(s) to you, it may result in a delay in complying with my instructions as to the disposition of assets in my Active Assets Account. Additionally, if my Active Assets Account is terminated you may, and I authorize you to, redeem all Trust shares owned by me for my account or to close my Active Assets Insured Account at SSB.

Communications. You may send communications to me at the mailing address specified on my application form or at such other form of address as I may designate in writing. All communications whether sent by mail, telegraph, messenger or otherwise, shall be deemed given to me personally, whether actually received or not.

Governing Law. Part I, IA and Part IV of this Agreement and its enforcement shall be governed by the laws of the State of New York, all accounts which I may open or re-open with you or SSB and shall be binding upon me and/or my estate, executors, administrators, successors and assigns.

Part II of this Agreement and the Terms and Conditions of the Visa Account shall be governed by the laws of the State of Ohio except to the extent that the laws of the State where I reside explicitly apply. The finance charge

under Part II of this Agreement shall be governed by the National Banking Act and the laws of the State of Ohio.

Joint/Individual Liability. If this is a joint account, each of us will be jointly and individually liable under all the provisions of this Agreement.

Interest Charges. I acknowledge receipt of your standard written "Statement of Margin Interest Charges and Other Terms and Conditions for Margin Accounts."

Waiver/Modification. Except as provided in this Agreement, no provision of the Agreement may be waived, altered, modified or amended unless in a writing signed by your authorized representative.

Separability. If any provision of this Agreement is held to be unenforceable, it shall not affect the validity of any of the remaining provisions.

Effectiveness of Agreement. This Agreement shall become effective upon acceptance by you and the Bank. You and the Bank reserve the right to reject this Agreement for any reason whatsoever.

DEAN WITTER REYNOLDS INC.
OPTION CLIENT INFORMATION

Personal and Financial Data
To be completed by the Customer(s)

☒ New Account ☐ Data Update

Date Completed *08/09/85*

Account No. *218-026156-03-049*

Full Account Title
Billie L. Wederski

Occupation (Indicate former occupation if retired.)
Manager ☐ Retired

Employer
WesperCorp

Spouse's Occupation (Indicate former occupation, if retired.) ☐ Retired

Spouse's Employer

Age ☐ Under 25 ☐ 25-39
☒ 40-50 ☐ 51-65 ☐ Over 65

Marital Status
☐ Single ☒ Married
☐ Widowed ☐ Divorced

No. of Dependents: 0

☒ New Account
☐ Established Relationship since 19____.

Type of Account
☒ Margin ☐ Cash

☐ Related to DWR Employee
If so, relationship:

Approximate Annual Income
(All Sources) *50M*

Approximate Net Worth
(Excluding Residence) *500M*

Approximate Liquid Net Worth
(Securities, Cash, etc.) *250M*
Current Acct. Equity
500M

Previous Investment Experience (Since what year?)

Stocks	Bonds	Options	Commodities
19____	19____	19____	19____

Bank Reference
Home S & L, Fort Valley, CA

Option Accounts with Other Firms:
Firm Name: Interest Rate _____
Since 19____
Type — ☐ Cash ☐ Margin
Firm Name: Equity _____
Since 19____
Type — ☐ Cash ☐ Margin

Third Party
☐ Power of Attorney
☐ Discretionary Authorization for DWR Employee
☐ Third Party Agreement on File
Name of Authorized Party:
Relationship:
Investment Experience:

Stocks	Options	Commod
19____	19____	19____

Objectives and Strategies
Investment Objectives
(Number in order of priority)
3 Income (Covered Call writing only)
1 Investment Hedge
2 Speculative Income
4 Speculation
5 Other: _____

Anticipated Types of Options Transactions

- ☐ Covered Call Writing Only
- ☐ Purchased Options
- ☐ Equal Quantity Spreads
- ☐ Uncovered Writing/Ratio Writing
- ☐ Put Writing (Full deposit of strike price)
- ☒ All Types of Option Trading

Customer Acknowledgement

I/We certify that the foregoing information is accurate and agree to advise you in writing of any changes in my/our financial situation and/or investment objectives. FURTHER, I/WE ACKNOWLEDGE RECEIPT OF A CURRENT OPTION CLEARING CORPORATION PROSPECTUS AND UNDERSTAND THE INFORMATION CONTAINED THEREIN. FURTHER, I/WE HAVE READ, UNDERSTAND AND AGREE TO BE BOUND BY THE PROVISIONS OF THE OPTION AGREEMENT ON THE REVERSE SIDE OF THIS FORM.

Client Signature: *Billie L. Wederski*

Date: *8/8/85*

Client Signature (if joint):

Date:

AE Approval

I have reviewed the foregoing information, that it is accurate to the best of my knowledge, and believe that the anticipated option trading is appropriate. Further, I have furnished a current Options Clearing Corporation Prospectus to the customer on (date): 8/8/85.

Account Executive — Print Name

R. Morrison

Signature: *R. Morrison*

Date: *8/9/85*

Branch Manager and ROP Approval

I have reviewed the foregoing and have

- ☒ APPROVED
- ☐ DISAPROVED the account for options trading
- ☒ AS NOTED ABOVE, or as follows:
- ☐ Covered Call Writing Only
- ☐ Purchasing Options
- ☐ Equal Qty. Spreads
- ☐ Uncovered Writing/Ratio Writing
- ☐ Put Writing (Full deposit of Strike Price)
- ☐ All Types

Branch Manager — Print Name

H. Duke

Signature: Date:

H. Duke *8/9/83*

Registered Options Principal — Print Name

Signature Date:

APPENDIX F

OPTIONS TRADING AGREEMENT

To Dean Witter Reynolds:

This letter is written to you in connection with puts, calls, and other forms of options which you may purchase, sell, exercise, or endorse for my account. I realize that options exchanges are intended to provide a secondary market where options positions can be liquidated at any time, but there is no guarantee that such liquidity will be consistently available. I further understand the risks of buying and selling options and that options are not for everybody and that their suitability is dependent upon the circumstances of the individual investor.

In consideration of your handling options transactions for my account, I agree that:

1. I will be bound by the constitutions, rules, regulations, customs, usages and by-laws of the Exchanges, Options Clearing Corporation, or other marketplace and their clearing house, if any, where transactions are executed.

2. I will not, acting alone or in concert with others, directly or indirectly, hold, control, or write in excess of the number of options contracts fixed from time to time by the exchanges or market as the position limit for one or more classes or series of options.

3. I will not exercise a long position in any option contract where, acting alone or in concert with others, directly or indirectly, I have or will have exercised in excess of the number of option contracts as may be fixed from time to time by the exchanges or market.

4. I hereby authorize you in your discretion, should I die or should you deem it necessary for your protection, to buy, sell, or sell short for my account and risk, puts, calls, or other forms of options and/or to buy, sell, or sell short any part or all of the underlying shares represented by options endorsed by you for my account. Any and all expenses incurred by you in connection with such transactions will be reimbursed by me.

5. All monies, securities or other property which you may hold in any account of mine shall be held subject to a general lien for the discharge of my obligations to you under this agreement.

6. Any controversy between us arising out of or relating to this agreement or the breach thereof, shall be settled by arbitration, in accordance with the rules, then obtaining, of either the American Arbitration Association, the Board of Arbitration of the New York Stock Exchange, the American Stock Exchange, the Chicago Board Options Exchange, or the National Association of Securities Dealers Inc. as I may elect. If I do not make such election by registered mail addressed to you at your main office within five (5) days after receipt of notification from you requesting such election, then I authorize you to make such election in my behalf.

7. This agreement and its enforcement shall be governed by the laws of the State of New York and its provisions shall be continuous: shall cover individually and collectively all accounts which I may open or re-open with you, and shall enure to the benefit of your present organization, and any successor organization, and of the assigns of your present organization or any successor organization, and shall be binding upon me and/or my estate, executors, administrators and assigns.

8. All other agreements existing between us or hereafter made, which, by their terms apply to all accounts of mine with you, shall be applicable to my options account or accounts where they are not in conflict with this agreement. Should a conflict exist it shall be resolved in favor of this agreement. Otherwise, the provisions of each agreement shall be applicable.

9. I am aware of your requirements and time limitations for accepting an exercise notice, and, at expiration date, I understand that I may not receive actual notice of an exercise until the week following.

10. I have been advised of your policies regarding margining of options and related transactions and agree to be bound thereby.

11. I understand and acknowledge that, when transactions on my behalf are to be executed in options traded in more than one marketplace, in the absence of my specific instructions, you may use your discretion in selecting the market in which to enter my order.

12. I recognize the fact that, in connection with option trading, situations arise whereby customers neglect to instruct their broker with respect to the disposition of expiring profitable options. If such options are allowed to expire they become worthless. These are commonly referred to as "abandoned options". In this connection, in order to avoid the loss to me in connection with expiring options I hereby authorize D.W.R., in its absolute discretion, to exercise any and all profitable options that are long in my account at the time of their expiration and, as to the disposition of which, I have not previously given D.W.R. contrary instructions. If D.W.R. elects to exercise this discretionary authority it is agreed that D.W.R. will attempt to advise me thereof on the first business day

following expiration. In the event D.W.R. is unable to contact me or in the event I do not enter contrary instructions, D.W.R. is hereby authorized to liquidate the securities credited to my account as a result of the exercise of the options and to credit my account in a fair and equitable manner after the deduction of a service charge. Under no circumstance will my account be debited with a loss as a result of such transactions.

13. I am aware that exercise assignment notices for option contracts are allocated among D.W.R. customer short positions pursuant to an automated procedure which randomly selects from among all customer short option positions, including positions established on the day of assignment, those contracts which are subject to exercise. All short option positions are liable for assignment at any time. I may request a more detailed description of your random allocation procedure at any time.

PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 1706 Maple Avenue, Los Angeles, California.

On October 13, 1987, I served the within Petition for Writ of Certiorari in re: "Dean Witter Reynolds Inc. vs. Billie L. Wederksi" in the United States Supreme Court, October Term 1987, No. . . . .;

On the Parties in said action, by placing Three copies thereof enclosed in a sealed envelope with postage fully prepaid, in the United States post office mail box at Los Angeles, California, addressed as follows:

Arthur Nakazato, Esq.
Kircher & Nakazato
811 W. 7th St., #1100
Los Angeles, CA 90017

Barnet Resnick, Esq.
Greenwald & Resnick
4350 Von Karman Ave., #450
Newport Beach, CA 92660

Michael M. Gless, Esq.
Keesal, Young & Logan
310 Golden Shore Drive
P.O Box 1730
Long Beach, CA 90801-1730

All Parties required to be served have been served.

I certify (or declare), under penalty of perjury, that the foregoing is true and correct.

Executed on October 13, 1987, at Los Angeles, California

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CE CE MEDINA